93-439

No. _____

Supreme Court, U.S.
FILED
SEP 20 1993
OFFICE OF THE CLERK

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1993

PETER JOSEPH SALZMANN,
Petitioner,

v.

STATE OF OREGON,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

LAURA GRASER
Post Office Box 12441
Portland, Oregon, 97212
Telephone: (503) 287-7036
Counsel for Petitioner
Peter Joseph Salzmann

September 1993

Question Presented

During this criminal defendant's jury trial he moved to dismiss based on prosecutorial misconduct. The motion was denied. The jury was unable to reach a verdict, and the state seeks to re-try him. After the trial he filed a motion to dismiss on the grounds of double jeopardy, which was denied.

Does the petitioner, a criminal defendant, have a federal constitutional right, under the Double Jeopardy Clause, to an interlocutory appeal of his motion to dismiss before a re-trial? Does the rule in Abney v. United States, 431 U.S. 651 (1977) apply to the states, or is it merely an interpretation of a federal statute?

TABLE OF CONTENTS

Question presented i

Petition for a writ of certiorari 1

Opinions below 1

Jurisdiction 1

Constitutional provisions involved 2

Statement of the case 2

Reasons for granting the writ 5

Conclusion 13

Appendix:

The opinion below, State v. Salzmann, 119 Or. App. 217. . . . . A-1

Defendant's post-trial Motion to Dismiss . . . A-11

Order Denying Review, June 22, 1993 . . . . A-12

TABLE OF AUTHORITIES

CONSTITUTIONAL PROVISIONS

Federal

United States Constitution, Fifth Amendment 2, 5, 6

State of Oregon

Oregon Constitution, Article VII (Amended) § 2 5

CASES

United States Supreme Court

Abney v. United States, 431 U.S. 651 (1977) ..... i, 1, 4-6, 9, 11, 12

Flanagan v. United States, 465 U.S. 259 (1984) 10

Green v. Ohio, 455 U.S. 976 (1982) 9

Helstoski v. Meanor, 442 U.S. 500 (1979) 10

Midland Asphalt Co. v. United States, 489 U.S. 794 (1989) 10

Mitchell v. Forsyth, 472 U.S. 511 (1985) 9, 10

Richardson v. United States, 468 U.S. 317 (1984) 10

Spradling v. Texas, 455 U.S. 971 (1982) 9, 12

Stack v. Boyle, 342 U.S. 1 (1951) 10

United States v. Hollywood Motor Car,
458 U.S. 263 (1982) 11

United States v. MacDonald, 435 U.S. 850 (1978) . . . 11

State courts

Com. v. Bolden, 472 Pa. 602, 373 A.2d 90 (1977) 8

Com. v. Chatfield-Taylor, 399 Mass. 1,
502 N.E.2d 512 (1987) 7

County Court in and for the City of El Paso v. Ruth,
194 Colo. 352, 571 P.2d 1 7

Crawley v. Kunzman, 585 S.W. 2d 387 (Ken 1979) . . . 7

Ex parte Robinson, 641 S.W.2d 552
(Tex. Crim. 1982) 8, 12

Grey v. State, 36 Md. App. 708, 375 A.2d 31 (1977) . . 7

Griffin v. State, 545 So.2d 729 (Miss. 1989) 7

Jones v State, 450 So.2d 186 (Ala. 1984) 8

Mosley v. Carey, 74 Ill. 2d 527, 387 N.E.2d 325 (1979) 7

Nalbandian v. Superior Court, 163 Ariz. 126, 786 P.2d 977 (1989), cert. denied 111 S.Ct 554 (1990) 6, 7

Petition of Lucas, 276 Kan. 486, 789 P.2d 1157 (1990) . 7

Routh v. United States, 483 A.2d 638 (D.C. Ct. App. 1984) 7

Selvey v. State, 201 Ga. App. 848, 412 S.E.2d 611 (1991)7

Stamper v. State, 672 P.2d 106 (Wyo 1983) 8

State ex rel Dowdy v. Robinson, 257 S.E. 2d 167 (W. Va. 1979) 8

State ex rel Forsyth v. District Court, 701 P.2d 1346 (Mont. 1985) 8

State v. Ambrose, 598 P.2d 354 (Utah 1979) 8

State v. Broughton, 62 Ohio St. 3rd 253, 581 N.E. 2d 541 (1991) 8

State v. Endsley, 214 Or. 537, 331 P.2d 338 (1958) . . . 9

State v. Hanson, 483 A.2d 723 (Me. 1984) 7

State v. Haynes, 232 Or. 330, 375 P.2d 550 (1962) 9

State v. Janvrin, 121 N.H. 370, 430 A.2d 152 (1981) . . 7

State v. Jenich, 94 Wisc. 2d 74, 292 N.W.2d 348 (1980) 8

State v. Joseph, 92 N.C. App 203, 374 S.E. 2d 132 (1988)9

State v. McKenna, 188 Conn. 671, 453 A.2d 435 (1982) 7

State v. Mestas, 93 N.M. 795, 605 P.2d 1164 (1980) . . . 8

State v. Milenkovich, 236 Neb. 42,
458 N.W.2d 747 (1990) 7

State v. Miller, 289 S.C. 426, 346 S.E. 2d 705 (1986) . . 9

State v. Robideaux, 475 N.W.2d 915 (N.D. 1991) 8

State v. Salzmann, 119 Or. App. 217,
850 P.2d 1122 (1993) 1, 4, 6

State v. Sundel, 460 A.2d 939 (R.I. 1983) 8

Whitwell v. State, 520 S.W. 2d 338 (Tenn. 1975) 8

Wiley v. Altman, 52 N.Y.2d 410, 438 N.Y.S.2d 490,
420 N.E.2d 371 (1981) 8

STATUTES

Federal

28 U.S.C. § 1257(a)(1988) 1
28 U.S.C. § 1291 . . . . . 6, 11

State

Or. Rev. Stat. § 34.105-.240 5
Or. Rev. Stat. § 138.040 3
Or. Rev. Stat. § 138.053 3

Petition for a Writ of Certiorari

Petitioner, a criminal defendant, respectfully prays that the Court issue a writ of certiorari to review the judgment and opinion of the Oregon Court of Appeals in this case.

Opinions Below

The Oregon Court of Appeals opinion is reported as State v. Salzmann, 119 Or. App. 217, 850 P.2d 1122 (1993), and is set forth in the appendix, at A-1. The defendant sought review in the Oregon Supreme Court and review was denied, without an opinion, on June 22, 1993.

Jurisdiction

The Oregon Court of Appeals is the highest court of a State in which a decision could be had in this case. Petitioner claims a right to an interlocutory appeal under the United States Constitution. Jurisdiction of this court is based on 28 U.S.C. § 1257(a).

The appellate decision was issued by the Oregon Court of Appeals on April 14, 1993. Review in the Oregon Supreme Court, which is discretionary, was timely sought and was denied in an Order on June 22, 1993. A-12. The effective date of the appellate judgment was August 30, 1993. This petition is filed within 90 days of the June 22, 1993, Order Denying Review from the Oregon Supreme Court.

Constitutional Provisions Involved

The Fifth Amendment to the United States Constitution provides in relevant part:

> ". . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . . ."

Statement of the Case

Petitioner was charged with kidnapping and rape in Oregon state court. The defense was mistaken identification. He had a jury trial. During the trial he moved for a mistrial several times, claiming that the prosecutor withheld relevant exculpatory discovery and engaged in prosecutorial misconduct. The jury was unable to reach a verdict and the court declared a mistrial. The petitioner then moved to dismiss based on double jeopardy, due to the prosecutor's misconduct.[1] A-11. That motion was denied.

The prosecution seeks to re-try the case.

The petitioner sought appellate remedies in state court. He conceded that no Oregon statute authorized an

---

[1] The argument on misconduct was on both state and federal grounds. Throughout the proceedings the petitioner raised state former jeopardy grounds as well, but those grounds will not be discussed here.

interlocutory appeal,[2] but argued that he had a federal right

---

[2] The statute on appeals for criminal defendants, provides:

Or. Rev. Stat. § 138.040:
(1) Except as provided under ORS 138.050 [regarding an appeal after a guilty plea], the defendant may appeal to the Court of Appeals from a judgment or order described under ORS 153.053 in a district or circuit court, and may cross-appeal when the state appeals . . . . .

Or. Rev. Stat. § 138.053:
(1) This section establishes the judgments and orders that are subject to the appeal provisions and to the limitations on review under ORS 138.040 and 138.050. A judgment or order of a court, if the order is imposed after judgment, is subject to ORS 138.040 and 138.050 if this disposition includes any of the following:

(a) Imposes a sentence on conviction.

(b) Suspends imposition or execution of sentence.

(c) Places a defendant on probation.

(d) Extends a period of probation.

(e) Imposes or modifies a condition of probation or of sentence suspension.

under the double jeopardy clause to have an interlocutory appeal, citing Abney v. United States, 431 U.S. 651 (1977). Motion to Determine Appellate Jurisdiction, page 1. He filed two cases simultaneously, only the first is directly relevant to this petition.

First, he filed a notice of appeal in the Oregon Court of Appeals, claiming that the federal double jeopardy clause gave him a right to a pre-trial appeal. The Court of Appeals dismissed the appeal, originally without writing any opinion. Later, on reconsideration, the Court of Appeals wrote an opinion which is reported at 119 Or. App. 217, 850 P.2d 1122 (1993). The court specifically discussed the federal double jeopardy clause, and held that Abney did not hold that a defendant has a constitutional right to an interlocutory appeal. As the right to appeal is statutory, and there is no applicable statute, the state court held there was no right to an interlocutory appeal. The petitioner sought review in the Oregon Supreme Court, which has discretionary review. It denied review on June 22, 1993. An appellate judgment was issued August 30, 1993. The petitioner seeks a writ of certiorari from this.

(f) Imposes or executes a sentence upon revocation of probation or sentence suspension. . . . .

(3) . . . upon an appeal from a judgment or order described in paragraph (f) of subsection (1) of this section, the appellate court may review the order that revoked the defendant's probation or sentence suspension.

Second, simultaneously he filed a petition for a writ of mandamus in the Oregon Supreme Court under Or. Rev. Stat. § 34.105-.240. The Oregon Supreme Court has discretion as to whether or not to hear such petitions, and it declined to hear it. Or. Constitution Art VII (Amended) § 2. He does not seek review of this ruling.

The proceedings have been stayed in the trial court pending appellate review.

Reasons for Granting the Writ

The constitutional double jeopardy protection guarantees that a criminal defendant not be subjected to a second trial. United States Constitution, Fifth Amendment. The guarantee is meaningless if there is no mechanism, such as an appeal, to review the double jeopardy claim before the second trial.

This point was recognized in Abney v. United States, 431 U.S. 651, 661-62 (1977).

> "'[T]he State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.'[Citations

omitted]

> "Obviously, these aspects of the [double jeopardy] guarantee's protections would be lost if the accused were forced to 'run the gauntlet' a second time before an appeal could be taken; even if the accused is acquitted, or, if convicted, has his conviction ultimately reversed on double jeopardy grounds, he as still been forced to endure a trial that the Double Jeopardy Clause was designed to prohibit."

This Court held that the defendant would be allowed an interlocutory appeal, even though the applicable federal statute provided that appeals were to be from "final decisions." 431 U.S. 662.

Here the Oregon court held that Abney was based on a federal statute, 28 U.S.C. § 1291, rather than on the Fifth Amendment Double Jeopardy Clause. 119 Or. App. 224, 850 P2d at 1126, A-7. Other states have varied in their reading of Abney. Some say it describes a constitutional right. Some say it does not, but that the state procedure does permit an interlocutory hearing. See, e.g., Nalbandian v. Superior Court, 163 Ariz. 126, 786 P.2d 977 (Ariz. App. 1989), cert denied, 111 S.Ct. 554 (1990) (discussing the debate, holding the appellate right is constitutional, and employing a state statute to effectuate the right); State v. Milenkovich, 236 Neb. 42, 458 N.W.2d 747 (1990) (discussing the debate, not resolving the basis

of the right, and employing a state statute to grant an appeal.)[3]

---

[3] See: ARIZONA: Nalbandian v. Superior Court, 163 Ariz. 126, 786 P.2d 977, supra; COLORADO: County Court in and for the City of El Paso v. Ruth, 194 Colo. 352, 571 P.2d 1, 4 (Colo. 1978) (writ of prohibition); CONNECTICUT: State v. McKenna, 188 Conn. 671, 453 A.2d 435 (1982) (interlocutory appeal, apparently via statute); DISTRICT OF COLUMBIA: Routh v. United States, 483 A.2d 638 (D.C. Ct. App. 1984) (interlocutory appeal, citing Abney); GEORGIA: Selvey v. State, 201 Ga. App. 848, 412 S.E.2d 611 (1991) (appeal of right, citing statute and caselaw); ILLINOIS: Mosley v. Carey, 74 Ill.2d 527, 387 N.E.2d 325, cert. denied (1979) (holding appeal a matter of statute, but other mechanisms for pre-trial review are available); KANSAS: Petition of Lucas, 276 Kan. 486, 789 P.2d 1157, 1159 (1990) (hearing via habeas corpus); KENTUCKY: Crawley v Kunzman, 585 S.W. 2d 387, 388 (Ken. 1979) (by order of prohibition, citing Abney); MAINE: State v. Hanson, 483 A.2d 723 (Me. 1984) (by appeal, citing Abney); MARYLAND: Grey v. State, 36 Md. App. 708, 375 A.2d 31 (1977) (by appeal, citing Abney); MASSACHUSETTS: Com. v. Chatfield-Taylor, 399 Mass. 1, 502 N.E.2d 512 (1987) (by petition); MISSISSIPPI: Griffin v. State, 545 So.2d 729, 732 (Miss. 1989) (interlocutory appeal under court rule, state caselaw, and Abney); NEBRASKA: State v. Milenkovich, 236 Neb. 42, 458 N.W.2d 747 (1990), discussed above; NEW HAMPSHIRE: State v. Janvrin, 121 N.H. 370, 430 A.2d 152 (1981) (interlocutory appeal, citing Abney); NEW

MEXICO: State v. Mestas, 93 N.M. 795, 605 P.2d 1164 (1980) (interprets statute as permitting interlocutory appeals); NEW YORK: Wiley v. Altman, 52 N.Y.2d 410, 438 N.Y.S.2d 490, 420 N.E.2d 371 (1981) (by statute); NORTH DAKOTA: State v. Robideaux, 475 N.W.2d 915 (N.D. 1991), aff'd on other gds., 493 N.W.2d 210 (1992) (no direct appeal, but other methods to secure pre-retrial review of double jeopardy claim); OHIO: is mixed: State v. Broughton, 62 Ohio St 3rd 253, 581 N.E.2d 541, 549 (1991) noted that there is no appeal of right, but the court, sua sponte felt "compelled to review" in this case; PENNSYLVANIA: Com. v. Bolden, 472 Pa. 602, 373 A.2d 90 (1977) (appeal); RHODE ISLAND: State v. Sundel, 460 A.2d 939 (R.I. 1983); TENNESSEE: Whitwell v. State, 520 S.W. 2d 338 (Tenn. 1975); TEXAS: Ex parte Robinson 641 S.W. 2d 552 (Tex. Crim. 1982) (holding Abney based on Fifth Amendment, habeas corpus is mechanism); UTAH: State v. Ambrose, 598 P.2d 354, 357 (Utah 1979) (interprets statute to allow); WEST VIRGINIA: State ex rel Dowdy v. Robinson, 257 S.E.2d 167 (W. Va. 1979) overruled on other gds., 289 S.E.2d 720 (1982) (appeal); WISCONSIN: State v. Jenich, 94 Wisc. 2d 74, 292 N.W.2d 348 (1980) (permissive statutory appeal); WYOMING: Stamper v. State, 672 P.2d 106 (Wyo. 1983) (there must be an appellate remedy).

Counsel has found four jurisdictions that do not permit interlocutory review. ALABAMA: Jones v State, 450 So.2d 186 (Ala. 1984); MONTANA: State ex rel Forsyth v. District Court, 216 Mont. 480, 701 P.2d 1346

This Court has left the issue open. In Spradling v. Texas, 455 U.S. 971 (1982) Justices Brennan and Marshall dissented from a denial of a petition for a writ of certiorari to the State of Texas on a interlocutory appeal of a double jeopardy claim. In Green v. Ohio, 455 U.S. 976 (1982) Justices White, Blackmun, and Powell dissented from a denial of a petition for a writ of certiorari to the State of Ohio on an interlocutory appeal of a double jeopardy claim. Justice White wrote that Abney was not by its terms limited to federal cases and noted that the Court has long recognized that statutory finality requirements should not be construed to cause irreparable injuries. 455 U.S. at 979.

In civil cases the Court has permitted an interlocutory appeal from state court regarding a party's federal-law claim that he is not subject to suit. See, Mitchell v. Forsyth, 472 U.S. 511, 525 n.8 (1985).

(1985); NORTH CAROLINA: State v. Joseph, 92 N.C. App 203, 374 S.E. 2d 132 (1988), cert denied; SOUTH CAROLINA: State v. Miller, 289 S.C. 426, 346 S.E. 2d 705 (1986) (saying Abney a matter of statute).

OREGON's most recent Supreme Court decision, holding an interlocutory appeal is not available, is pre-Abney. State v. Haynes, 232 Or. 330, 375 P.2d 550 (1962), see also State v. Endsley, 214 Or. 537, 331 P.2d 338 (1958).

Petitioner believes that a fair reading of Abney establishes that it is constitutionally based. The Court was compelled to put a gloss on the applicable statute to permit the interlocutory appeal: the discussion of the statute was a discussion of the mechanism the court was using to effectuate the constitutional right. This Court reiterated the ruling in Richardson v. United States, 468 U.S. 317, 322 (1984), despite the government's argument that pre-retrial review would require the appellate court to review the sufficiency of the evidence.

Other rulings from this Court underline the point. When a constitutional guarantee protects a defendant from going to trial at all, there must be a tool to effectuate that right. Helstoski v. Meanor, 442 U.S. 500 (1979) held that the Speech or Debate Clause protects a member of Congress from being questioned in any other place for any speech or debate in either house, and therefore a pre-trial appeal is permitted. Mitchell v. Forsyth, 472 U.S. 511, 527-30 (1985) held that a claim of immunity protects a person from being forced to litigate the consequences of official conduct, and therefore a pre-trial appeal is permitted.[4] When a constitutional right can be vindicated after trial, the appeal must wait until after the trial.

---

[4] Another permissible pre-judgment appeal is from the denial of a motion to reduce bail. Stack v. Boyle, 342 U.S. 1 (1951). The right to pre-trial bail must be enjoyed pre-trial, or not at all. Here, the appeal ordinarily would not interrupt the trial.

Midland Asphalt v. United States, 489 U.S. 794 (1989) (right to grand jury secrecy can be heard after trial); Flanagan v. United States, 465 U.S. 259 (1984) (right to permissible counsel of one's choice can be heard after trial); United States v. Hollywood Motor Car Co., 458 U.S. 263 (1982) (right to be free of vindictive prosecution can he heard after trial); United States v. MacDonald, 435 U.S. 850 (1978) (right to a speedy trial can be heard after trial).

A criminal defendant would always prefer to have a dismissal rather than a trial. The Constitution does not protect that preference. What it does protect are its own guarantees that a trial not be had, as when a defendant raises the Double Jeopardy Clause or the Speech or Debate Clause.

Abney noted that there is no federal constitutional right to an appeal. 431 U.S. 656. Indeed, the State of Oregon could abolish its own appellate courts without objection from the federal courts, but that abolition would not end a criminal defendant's right to a mechanism to vindicate his federal rights. Having set up a state appellate system, that is an available mechanism for the petitioner, just as the federal appellate system and 28 U.S.C. § 1291 was the available mechanism for Mr. Abney. The absence of a state statute does not foreclose the petitioner's rights under the Double Jeopardy Clause.

It is instructive that most of the state courts with reported decisions have either a statute permitting an interlocutory appeal of double jeopardy claims or have a holding from the court permitting such an appeal.

There are other states, such as Oregon, that have no statute permitting an interlocutory appeal to raise a double jeopardy claim, and have a court ruling forbidding such an appeal.[5] If the Abney rule is based on the United States Constitution, those state laws are unconstitutional. If the Abney rule is not based on the United States Constitution, state courts and legislatures which have such a rule need to know that it is optional under federal law.

This Court should grant the petition and articulate the basis of the Abney rule to resolve this conflict among the states.

[5] Four other examples are listed in footnote 3. The Texas law discussed in Spradling has shifted, and there is an right of review via a state habeas corpus case. See, Ex parte Robinson, supra, footnote 3.

Conclusion

The Oregon court has decided an important question of federal law which has not been, but should be, settled by this Court. There is a conflict among the states. Therefore, the Court should issue a writ of certiorari to review the judgment and decision of the Oregon Court of Appeals in this case.

Respectfully submitted,

Laura Graser
Counsel of Record for Petitioner
P.O. Box 12441
Portland, Oregon, 97212
Telephone: (503) 287-7036

September ___, 1993

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

STATE OF OREGON,
Respondent,

v.

PETER JOSEPH SALZMANN,
Appellant.

(C9111-36157; CA A75561)

Appeal from Circuit Court, Multnomah County.

Kimberly C. Frankel, Judge.

On appellant's petition for reconsideration of an order dated October 30, 1992, dismissing the appeal.

Laura Graser, Portland, for petition.

Before Riggs, Presiding Judge, and De Muniz and Durham, Judges.

De MUNIZ, J.

Reconsideration allowed; appeal dismissed; order modified to delete costs.

De MUNIZ, J.

We dismissed defendant's appeal in an order of dismissal. ORAP 7.15(1). Defendant filed a petition for review, which we treat as one for reconsideration. ORAP 9.15(1). We allow reconsideration, modify our previous order and adhere to it as modified.[1] The issue is whether defendant has a right to a direct interlocutory appeal when a trial court denies a motion to dismiss on the ground of former jeopardy.[2] We conclude that he does not and allow the state's motion to dismiss the appeal.

Defendant is charged with rape, kidnapping and robbery. His defense is mistaken identity. During trial, he moved for a mistrial on several occasions, claiming that the prosecutor had engaged in misconduct by withholding relevant and exculpatory discovery. The circuit court denied those motions. The jury was unable to reach a verdict and the court declared a mistrial. Defendant moved to dismiss the charges on the ground of former jeopardy based on the nature of the prosecutor's conduct. *See State v. Kennedy*, 295 Or 260, 666 P2d 1316 (1983). The court entered an order denying defendant's motion. Defendant appeals from that order.[3]

We first analyze the issue under Oregon law. Defendant concedes, and we agree, that no statute gives him the explicit right to an interlocutory appeal from the denial of a motion to dismiss on the ground of former jeopardy.[4] However, he draws our attention to the substantive protection of

the state constitution's former jeopardy clause. *See also* ORS 131.505 to ORS 131.535. Article I, section 12 provides in part:

> "No person shall be put in jeopardy twice for the same offence [*sic*]."

As the Supreme Court recently said:

> "The purposes of the constitutional protection are to prevent the state from attempting repeatedly to convict a person for the same offense, thereby subjecting the person to embarrassment, expense, and continuing anxiety, and to give a person the right to have a trial completed by a particular tribunal once trial has begun." *State v. Wolfs*, 312 Or 646, 653, 826 P2d 623 (1992).

Defendant argues that Article I, section 10, of the state constitution gives him the right to an interlocutory appeal when a trial court denies a motion to dismiss on the ground of former jeopardy. Article I, section 10, provides:

> "No court shall be secret, but justice shall be administered, openly and without purchase, completely and without delay, and every man shall have remedy by due course of law for injury done him in his person, property, or reputation."

Defendant contends that the substantive protections of the former jeopardy clause become meaningless unless a defendant has the right to an interlocutory appeal in which trial court error may be corrected *before* a second trial takes place.

Whatever merit defendant's argument may have in the abstract, we reject it because the issue appears to be foreclosed by the broad holding of *State v. Endsley*, 214 Or 537, 331 P2d 338 (1958). In *Endsley*, the court rejected the defendant's argument that he had a constitutional right to an appeal under Article VII, section 6; Article VII (amended), section 2 and Article I, section 10. After reviewing those provisions, the court said: "[I]t is not open to doubt that appeal in this state is a statutory privilege and not a constitutional right." 214 Or at 547. Moreover, in *State v. Haynes*, 232 Or 330, 375 P2d 550 (1962), the defendant appealed from an order denying a motion to dismiss on the ground of former jeopardy. The Supreme Court, citing *Endsley*, dismissed the appeal. 232 Or at 331-32. The Supreme Court has cited

Endsley with approval many times, most recently in *State v. Carmickle*, 307 Or 1, 6, 762 P2d 290 (1988). Consequently, we must reject defendant's argument that Article I, section 10, gives him a constitutional right to an interlocutory appeal from an order denying a motion to dismiss on the ground of former jeopardy.

In a related argument, defendant contends that, even if the Oregon Constitution does not give him a right to an interlocutory appeal, "disparities" in the statutory scheme violate Article I, section 20, the Equal Privileges and Immunities Clause. That section provides:

> "No law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens."

Defendant claims that a defendant under the jurisdiction of the district court may challenge the denial of a motion to dismiss on the ground of former jeopardy by petitioning for a writ of mandamus in the circuit court, but that a defendant under the jurisdiction of the circuit court may make such a challenge only by seeking a writ of mandamus directly with the Oregon Supreme Court. ORS 34.120.[5]

Defendant's argument fails to demonstrate that the statutory scheme has denied him, either individually or as a member of a class to which he belongs, a right to pursue a remedy, while granting that right to others who are similarly situated. *See State v. Clark*, 291 Or 231, 630 P2d 810, *cert den*

454 US 1084 (1981); *City of Klamath Falls v. Winters*, 289 Or 757, 619 P2d 217 (1980). Moreover, the characteristics of the statutory classification are not, like gender or ethnic background, personal to a defendant so as to make the statutory classification impermissible. *Hunter v. State of Oregon*, 306 Or 529, 533, 761 P2d 502 (1988).

Defendant's argument also fails to persuade us that the Oregon Constitution[6] and the statutory scheme lack a rational basis for designating different courts to rule on petitions for writs of mandamus. *See Atlantic Richfield Co. v. Greene*, 100 Or App 16, 19-20, 784 P2d 442 (1989), *rev den* 309 Or 698 (1990). It is true that a defendant in district court must pass through more layers of review, including review by this court, if a party appeals under ORS 34.240. It is also true that a defendant in circuit court may petition the Supreme Court directly, bypassing this court. ORS 34.120; ORAP 11.05. However, under both schemes and in every case, the Supreme Court remains the final arbiter.

More importantly, the remedy of direct interlocutory appeal, which is the specific right defendant seeks here, is equally *unavailable* to all defendants, regardless of whether they find themselves under the jurisdiction of the district or circuit court. ORS 138.040; ORS 138.053; *State v. Spencer*, 88 Or App 300, 301, 744 P2d 1009 (1987).

We turn now to defendant's arguments under federal law. No federal statute gives a defendant the right to an interlocutory appeal in a state criminal proceeding. However, defendant argues that *Abney v. United States*, 431 US 651, 97 S Ct 2034, 52 L Ed 2d 651 (1977), establishes a federal constitutional requirement for interlocutory appeals of denials of motions to dismiss on the ground of former jeopardy that all states must recognize. Although we cited *Abney* in *State ex rel Wark v. Freerksen, supra* n 5, neither this court nor the Oregon Supreme Court has addressed the issue that defendant presents here.

In *Abney*, the Court stated that the issue was "whether a pretrial order denying a motion to dismiss an indictment on double jeopardy grounds is a final decision within the meaning of 28 USC § 1291 and thus immediately appealable." 431 US at 653. (Footnote omitted.)[7] It began its analysis by stating two guiding principles:

> "First, it is well settled that there is no constitutional right to an appeal. *McKane v. Durston*, 153 US 684, 14 S Ct 913, 38 L Ed 867 (1894). * * * The right of appeal as we presently know it in criminal cases, is purely a creature of statute.
>
> "Second, since appeals of right have been authorized by Congress in criminal cases, as in civil cases, there has been a firm congressional policy against interlocutory or 'piecemeal' appeals and courts have consistently given effect to that policy. Finality of judgment has been required as a predicate for federal appellate jurisdiction." 431 US at 656.

The Court applied factors that it identified in *Cohen v. Beneficial Industrial Loan Corp.*, 337 US 541, 69 S Ct 1221, 93 L Ed 1528 (1949), and concluded that a pretrial order denying a motion to dismiss on the ground of former jeopardy fell within *Cohen's* "collateral-order exception to the final-judgment rule." *Abney v. United States, supra*, 431 US at 662.

One of the *Cohen* factors is whether the order appealed from involves an important right that would be lost, perhaps irreparably, if review had to await final judgment. In the course of its analysis of that factor, the Court explained the nature of the federal constitution's former jeopardy protection:

> "[T]he Double Jeopardy Clause protects an individual against more than being subjected to double punishments. It is a guarantee against being twice put to *trial* for the same offense." *Abney v. United States, supra*, 431 US at 660-61. (Emphasis in original.)

It stated that "the rights conferred on a criminal accused by the Double Jeopardy Clause would be significantly undermined if appellate review of former jeopardy claims were postponed until after conviction and sentence." 431 US at

660. The court said: "We therefore hold that pretrial orders rejecting claims of former jeopardy, such as that presently before us, constitute 'final decisions' and thus satisfy the jurisdictional prerequisites of [28 USC] § 1291." 431 US at 662.

If the source of the right to appeal in *Abney* was the federal constitution itself, as defendant argues, we fail to see why the Court went to great pains to frame the issue as one of statutory construction. We also fail to see why the Court would have emphasized what has become a maxim: that the federal constitution does not give a defendant the right to appeal.[8] The nature of the Court's analysis and the specificity in its holding persuade us that *Abney* is merely a case of statutory construction of a federal statute and not one that establishes a constitutional mandate for interlocutory appeals throughout the several states.

Defendant lists numerous state court decisions from other jurisdictions that cite *Abney* as they hold that a defendant has a right to an interlocutory appeal from the denial of a pretrial motion to dismiss on the ground of former jeopardy. However, many of those cases locate the source of that right as the Court in *Abney* did, by construing a respective state statute or rule to provide for an interlocutory appeal in that state. *See, e.g., State v. Jenich*, 94 Wis 2d 74, 288 NW2d 114 (1980). Defendant concedes that our legislature has not enacted a statute that allows for a direct interlocutory appeal under the circumstances presented here.

Finally, defendant argues that the statutory scheme in Oregon violates the Equal Protection Clause of the federal constitution. We reject that argument for the same reasons that we rejected defendant's equal privileges and immunities challenge under the state constitution. *See State v. Freeland*, 295 Or 367, 370, 667 P2d 509 (1983).

Reconsideration allowed; appeal dismissed; order modified to delete costs.

Footnotes, State v. Salzmann, 119 Or. App. 219 (1993)

1. The order assessed costs against defendant. We modify the order and assess no costs to either party.

2. If defendant is convicted, he can appeal and assign error to the court's ruling on the former jeopardy question. ORS 138.040; ORS 138.053(1)(a). *See State v. Brown*, 262 Or 442, 497 P2d 1191 (1972). If the court erred, we could reverse the conviction. *See State v. Embry*, 19 Or App 934, 530 P2d 99, *rev den* (1975). Consequently, the issue presented here is not whether defendant has the right to any appellate review, but whether he has the right to a direct interlocutory appeal on the former jeopardy issues *before* enduring another trial.

3. As the same time defendant pursued this interlocutory appeal, he sought to have the Oregon Supreme Court review the circuit court's order by way of an alternative writ of mandamus. ORS 34.120; ORAP 11.05. The court denied the petition without explanation.

4. We note a scenario, not present here, in which we would have explicit statutory authority to review a court's denial of a motion to dismiss on the ground of double jeopardy. If the state appealed from a pretrial order suppressing evidence, ORS 138.060(3), the defendant could file a cross-appeal, ORS 138.040, which would authorize us to review "[a]ny decision" that the district or circuit court had made "in an intermediate order or proceeding." ORS 138.060(1)(a).

5. In *State ex rel Wark v. Freerksen*, 84 Or App 90, 733 P2d 100, *rev den* 303 Or 534 (1987), a district court denied the defendant's motion to dismiss on the ground of former jeopardy. A circuit court issued a peremptory writ of mandamus directing the district court judge to vacate the order. The defendant trial judge appealed, ORS 34.240, and argued that mandamus was not a proper remedy, because direct appeal from the judgment in the criminal trial was a plain, speedy and adequate remedy in the ordinary course of law. *See* ORS 34.110. We rejected that argument. We acknowledged that direct appeal in criminal cases generally is regarded as a plain, speedy and adequate remedy in the ordinary course of law, *State ex rel Automotive Emporium v. Murchison*, 289 Or 265, 267, 611 P2d 1169 (1980), but concluded that the prospect of being unconstitutionally placed in jeopardy twice for the same offense was a sufficient injury to justfy mandaumus. *State ex rel Wark v. Frerksen, supra*, 84 Or App at 93-94.

We do not know whether the Supreme Court agrees with our conclusion in *Freerksen*. However, the Supreme Court's denial of defendant's petition for a writ of mandamus in this case does not necessarily mean that the court has determined that mandamus is an inappropriate remedy in every case in which a circuit court denies a motion to dismiss on the ground of former jeopardy.

6. Article VII (amended), section 2, of the constitution provides:

> "The courts, jurisdiction, and judicial system of Oregon, except so far as expressly changed by this amendment, shall remain as at present constituted until otherwise provided by law. But the supreme court may, in its own discretion, take original jurisdiction in mandamus, quo warranto and habeas corpus proceedings."

7. At that time, 28 USC § 1292 provided in part:

> "The courts of appeal shall have jurisdiction of appeals from all final decisions of the district courts of the United States * * * except where a direct review may be had in the Supreme Court."

8. *But see* Arkin, "Rethinking the Constitutional Right to a Criminal Appeal," 39 UCLA L Rev 503 (1992), for a scholarly criticism of *McKane v. Durston, supra,* which the author claims is the shaky foundation for the Court's rule.

IN THE CIRCUIT COURT
OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff,	))	NO. C91-11-36157 DEFENDANT'S
	)	POSTTRIAL
PETER JOSEPH SALZMANN, Defendant.	)))	MOTION TO DISMISS

Defendant request oral argument and anticipates that this motion will take approximately one-half judicial day to hear.

Defendant moves the court for an order dismissing the Indictment upon the ground that the former prosecution bars the prosecution of the defendant. Defendant will submit a detailed memorandum as soon as possible.

POINTS AND AUTHORITIES

ORS 135.470; 131.505-131.535

Art I, § 12, Or Const

Amendment V and XIV, US Const.

Dated: May 6, 1992

Respectfully submitted,

/s/
John Henry Hingson III- #71082
Attorney for the Appellant

IN THE SUPREME COURT
OF THE STATE OF OREGON

STATE OF OREGON, Respondent/Respondent,	)	NO. C91-11-36157
	)	ORDER DENYING
v.	)	REVIEW
	)	
PETER JOSEPH SALZMANN, Appellant/Petitioner.	)	CA A75561
	)	
	)	SC S39872

The Court has considered the petition for review and orders that it be denied.

DATE: June 22, 1993

/s/ WALLACE P. CARSON, JR.
WALLACE P. CARSON, JR.
CHIEF JUSTICE

COPIES TO:

VIRGINIA L. LINDER
Attorney for Respondent/Respondent

LAURA LOUISE GRASER
Attorney for Appellant/Petitioner